Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

JEANNE PIAUBERT, S.A., a corporation; and
FRAGRANCE GROUP, LTD., a corporation;
petitioners,

vs.

RANDY SEFRIOUI, an individual,
respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Ninth Circuit (no. 97-56131)

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS' SUA SPONTE CONSIDERATION OF EVIDENTIARY MATERIAL FOR THE FIRST TIME ON APPEAL, AND ITS IMPLICIT HOLDING THAT THE DISTRICT COURT HAD ABUSED ITS DISCRETION IN REFUSING TO CONSIDER THE MATERIAL; WITHOUT THE COURT OF APPEALS GIVING APPELLANT ANY NOTICE OR OPPORTUNITY TO BE HEARD ON EITHER POINT; AND THE COURT OF APPEALS' SUBSEQUENT HOLDING THAT APPELLANTS' COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CLAIM FOR RELIEF; VIOLATED APPELLANT'S' RIGHT TO FAIR PLAY AND SUBSTANTIAL JUSTICE, AND THEIR RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION.

2. IF ARGUENDO THE COURT OF APPEALS DID NOT ERR AS DESCRIBED IN QUESTION NO. 1; WHETHER THE COURT OF APPEALS ERRED BY ADOPTING A "PER SE" RULE THAT IF THE INTEREST RATE ON A NOTE IS LESS THAN THE "PRIME RATE" IN EFFECT AT THE TIME, THAT THE NOTE CAN NEVER BE DEEMED TO BE A "SECURITY" UNDER THE SECURITIES EXCHANGE ACT OF 1934, AND MUST NECESSARILY ALWAYS BE CONSIDERED A "COMMERCIAL" NOTE AND NOT AN "INVESTMENT" NOTE; EVEN WHEN, AS IN THE

PRESENT CASE, A RATE BELOW PRIME MEANT IT WAS MORE LIKELY THAT THE NOTE WAS AN INVESTMENT NOTE AND NOT A "COMMERCIAL" NOTE, THE LENDER AGREED TO PROVIDE UP TO $5 MIL. TO THE BORROWER AS START-UP VENTURE CAPITAL, THE NOTE WAS UNSECURED AND UNINSURED, THE NOTE WAS NOT PAYABLE FOR 5 YEARS, AND THE LENDER ALSO OBTAINED A SUBSTANTIAL EQUITY INTEREST IN THE BORROWER SIMULTANEOUSLY WITH THE BORROWER'S MAKING OF THE NOTE.

3. WHETHER THE ONLY FORM OF "PROFIT THAT A NOTE IS EXPECTED TO GENERATE" THAT A COURT MAY CONSIDER IN DECIDING IF A NOTE IS A "SECURITY" UNDER THE SECURITIES EXCHANGE ACT OF 1934, IS THE INTEREST RATE PAYABLE ON THE NOTE; OR WHETHER, INSTEAD, THE COURT SHOULD ALSO CONSIDER EXPECTED CAPITAL APPRECIATION AND PARTICIPATION IN EARNINGS.

LIST OF PARTIES

The caption of this petition already lists all parties to the proceeding. Supreme Court Rule 14(b).

LIST OF CORPORATE PARENTS AND NON-WHOLLY OWNED SUBSIDIARIES

Petitioner/plaintiff Jeanne Piaubert, S.A. is a French corporation which is wholly owned by Jacques Bogart, S.A., a publicly owned French corporation. Jeanne

Piaubert, S.A. does not have any non-wholly owned subsidiaries.

Petitioner/plaintiff Fragrance Group, Ltd. is a New York corporation which is wholly owned by Jacques Bogart, S.A., a publicly owned French corporation. Fragrance Group, Ltd. does not have any non-wholly owned subsidiaries.

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OPINIONS AND ORDERS BELOW

The Court of Appeals' memorandum opinion is not published. However, a reference thereto appears at 208 F.3d 221 (2000). Petitioners are not aware of any existing citation to the Court of Appeals's denial of their petition for rehearing to that court.

The district court's order of dismissal, and the Court of Appeals' memorandum opinion and its order denying the petition for rehearing, appear in the Appendix.

BASIS FOR THIS COURT'S JURISDICTION

The memorandum opinion of the Court of Appeals was filed and entered on 2/17/00. On 2/29/00 petitioners filed a petition for rehearing with the Court of Appeals, which was denied on 5/18/00. This petition for writ of certiorari is being filed within 90 days of 5/18/00. 28 U.S.C. sec. 2101(c); Supreme Court Rule 13(3).

This court has jurisdiction under 28 U.S.C. sec. 1254 and Supreme Court Rule 13.

STATUTES AND REGULATIONS INVOLVED

This case involves the construction of Sec. 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78j), of the definition of the term "security" in 15 U.S.C. Sec. 78c(a)(10), of SEC Rule 10b-5 (17 CFR sec. 240.10b-5). and the application of F.R.Civ.P.12(b)(6); all of which are reproduced in the Appendix.

STATEMENT OF THE CASE

Petitioners/plaintiffs in the within action are Jeanne Piaubert, S.A. ("JPSA"), a French corporation, and Fragrance Group, Ltd. ("FG Limited"), a New York corporation. First Amended Complaint ("FAC"), Appendix ("A") 23, 25. Plaintiff JPSA is the manufacturer and distributor of Jeanne Piaubert Cosmetics. Plaintiffs

sued respondent/defendant, Randy Sefrioui, for securities fraud, under sec. 10(b) of the Securities Exchange Act of 1934 ("the Act") and Rule 10b-5 thereunder.

The district court had federal question jurisdiction under 15 U.S.C. sec. 78aa and 28 U.S.C. sec. 1331, and had diversity jurisdiction under 28 U.S.C. sec. 1332.

On 6/9/97 the district court granted defendant Sefrioui's motion to dismiss under F.R.Civ.P. 12(b)(6). ruling that plaintiffs' FAC failed to state a claim upon which relief could be granted. A 18-21. An order dismissing the entire action without prejudice was entered on 6/16/97. A 22.

Plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit. On 2/17/00 that court issued its memorandum opinion (A 4-16), partially reversing and partially affirming the district court's order.

In their FAC, plaintiffs plead that in 12/93, defendant Sefrioui solicited plaintiffs, and met with Jacques Konckier, plaintiffs' president, to discuss the possibility of the distribution of Jeanne Piaubert Cosmetics in the U.S. Sefrioui suggested to plaintiffs that Sefrioui, along with his associates, the Hollisters, could begin an entirely new retail franchising business in the U.S. for the purpose of selling and distributing Jeanne Piaubert Cosmetic products in the U.S. A 26-27. The products had never before been sold or distributed in the U.S. After a number of further discussions and communications over the ensuing months, an agreement was reached between plaintiffs, and defendant Sefrioui and the Hollisters, for the establishment in the U.S. of a franchising business for Jeanne Piaubert Cosmetics. A 27-30.

Plaintiffs allege that defendant Sefrioui made a number of misrepresentations to them concerning his educational background and employment history; and

concerning the feasibility and achievability of various business plans, projections and forecasts. A 28-30.

Plaintiffs allege that all of these representations were false and/or misleading, and that the true facts were to the contrary. A 36-42, 45. They allege that the representations were made in telephone and mail communications. A 27-28, 38, 41. Plaintiffs allege that they reasonably and actually relied upon the representations and non-disclosures. A 38, 41-42, 44, 47.

Plaintiffs allege that as a result of the representations and omissions, and in furtherance of the agreement for the establishment of the franchise business, a California corporation called Jeanne Piaubert Holdings, Inc. ("Holdings") was formed. 2/3 of the outstanding shares of the common stock of Holdings were issued to JPSA, and 1/3 to Sefrioui and his co-promoters, the Hollisters. A 31. A limited partnership called "Jeanne Piaubert Cosmetics, L.P." ("Limited Partnership") was formed. The general partner of Limited Partnership was a corporation created pursuant to the agreement for the establishment of the cosmetics franchising business, called Jeanne Piaubert Management, Inc. ("Management"). Plaintiff FG Limited acquired a 49.5% limited partnership interest in Limited Partnership. Certain corporations which were wholly owned by Sefrioui and the Hollisters, and of which Sefrioui and the Hollisters were the alter egos, acquired a 49.5% interest in the Limited Partnership. A 31-32.

Plaintiffs allege that in furtherance of the agreement for the establishment of the U.S. franchising business, on 3/20/94 plaintiff JPSA entered into a Loan Agreement with Limited Partnership, under which JPSA transferred $5 mil. to Limited Partnership, and in return received a promissory note ("Note") from Limited Partnership. A 33.

Plaintiffs specifically allege that the Note was not any of the following: i) a note delivered in consumer financing; ii) a note secured by a mortgage on a home; iii) a short-term note secured by a lien on a small business or some of its assets; iv) a note evidencing a "character loan" to a bank customer; v) a short-term note secured by an assignment of accounts receivable; or vi) a note which simply formalized an open-account debt incurred in the ordinary course of business. Plaintiffs also specifically allege that the Note was not collateralized, and was due on 7/1/99; that the purpose of the Limited Partnership providing the Note was to raise money for the general use of the Limited Partnership and/or to finance substantial investments; and that plaintiff JPSA was interested primarily in the profit the Note was expected to generate. A 33.

Plaintiffs further allege that no payments were ever made on the Note, and that the business failed to get off the ground. A 35.

Plaintiffs plead that JPSA acquired "securities" in the form of the Note from Limited Partnership and the stock of Holdings; and that FG Limited acquired a "security" in the form of its limited partnership interest in Limited Partnership. A 37, 41.

Plaintiffs did not attach a copy of any document to their FAC. However, defendant Sefrioui attached copies of various documents, including a purported copy of the Note, as exhibits to his Rule 12(b)(6) motion. A 87 et seq. (Ex. C to motion), A 190 et seq. (Ex. D),[1] A 224 et

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[1] In order to minimize the size of their Appendix, plaintiffs do not include therein defendant's collectively voluminous Exs. A, B, E and F. None of these is referenced in the Court of Appeals' Opinion or in the within petition for writ of certiorari.

seq. (Ex. G). However, defendant made no argument to the district court that the rate of interest, or the fact that payment of principal and interest were deferred, had any bearing on whether the Note was a "security" under the Act, and did not make any argument based on the text of the Note or the other documents. A 53-85. Since, apart from plaintiffs' reference to and description of the various formation documents in their FAC, the actual text of these exhibits and documents were not part of the case, plaintiffs did not address their text in plaintiffs' opposition to defendant's motion. A 230-272. Moreover, the district court expressly ruled that it was disregarding all of these documents and exhibits submitted by defendant, stating that the matter had not been converted into a motion for summary judgment. A 19.

In partially reversing the district court's order of dismissal, the Court of Appeals held that the district court had erred in ruling that the stock of Holdings was not a "security", and in ruling that as a matter of law FG Limited's limited partnership interest was not a "security"; and remanded the matter to the district court. A 8-9.

In its memorandum opinion, the Court of Appeals acknowledged that plaintiffs' FAC pleads the requisite elements for the "Note" to constitute a "security." A 10.[2]

It also acknowledged the obvious fact that the

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[2] In a securities fraud action, a pleading is sufficient under F.R.Civ.P. 9(b) if it identifies the circumstances of the alleged fraud so that the defendant can prepare an adequate answer. This requires allegations of the time, place and nature of the alleged fraudulent activities, as well as an explanation as to what is false or misleading about the statements. The Rule 9(b) standard is met if it is not impossible to understand plaintiff's allegations. Warshaw v. Xoma Corp., 74 F.3d 955, 960 (9th Cir. 1996).

motivation of Limited Partnership in giving ("selling") the $5 mil. 5/20/94 Note was to raise general operating funds for the venture. A 12.

However, in partially affirming the district court's order of dismissal, the Court of Appeals went outside the pleadings, expressly considered the text of the note attached to defendant's motion (A 224-229) that the district court had expressly refused to consider, and ruled as a matter of law that the subject Note was not a "security" under the Act. A 10, 12-13, 16.

In deciding that it would consider the text of the subject Note, the Court of Appeals implicitly held that the district court had abused its discretion in ruling that it would not consider material extrinsic to plaintiffs' pleading, without giving plaintiffs any notice whatsoever that it would consider the correctness of that ruling by the district court, and without giving plaintiffs any opportunity whatsoever to oppose, on the merits, the argument that the Note showed on its face that it could not be a "security" under the Act as a matter of law.

Since the district court had expressly ruled that it was not considering the text of the Note, and since defendant Sefrioui did not file any cross-appeal; in their Appellants' Opening Brief, plaintiffs addressed neither the correctness of the district court's ruling that it would not consider evidence extrinsic to plaintiffs' FAC, nor the issue of whether the text of the Note itself precluded the Note from being a "security." Defendant failed to file an appellee's brief, and therefore he did not argue either of these issues to the Court of Appeals. Since defendant did not file an appellee's brief, plaintiffs did not file a reply brief. Defendant made no appearance at the 1/3/00 oral argument before the Court of Appeals.

However, the Court of Appeals considered the text of

the Note, and held that the Note could not be a "security" under the Act as a matter of law because it provided a rate of interest of 6%, which was less than the 7.25% "prime rate" purportedly in effect at the time; payment of interest and principal were deferred until 7/1/99; and that as a matter of law no reasonable buyer of a note would have been interested primarily in the profits such a note would be expected to generate; and that therefore the Note was "commercial" in nature and not an "investment", and therefore not a "security" under the Act. A 10-13.

ARGUMENT

1. THE COURT OF APPEALS ERRED IN IMPLICITLY HOLDING THAT IT MAY CONSIDER NEW EVIDENCE AND NEW ISSUES SUA SPONTE WITHOUT GIVING THE APPELLANT ANY NOTICE OR OPPORTUNITY TO BE HEARD.

A district court has "complete discretion to determine whether or not to accept any material beyond the pleadings that is offered in conjunction with a Rule 12(b)(6) motion." Isquith v. Middle South Utilities, Inc., 847 F.2d 186, 193 fn.3 (5th Cir. 1988), cert. den. 488 U.S. 926; 5A Wright and Miller, Federal Practice and Procedure, sec. 1366.

This rule is usually stated in the context of the requirement that the court must either reject the outside material, and analyze the pleading under Rule 12(b)(6); or else accept the outside material, but then convert the motion into a summary judgment motion under Rule 56, and give all parties the notice and opportunity to be heard and to submit material as described in Rule 56.

F.R.Civ.P. 12(b)(6); Fonte v. Board of Managers, 848 F.2d 24, 25 (2d Cir. 1988).

However, some cases have developed an additional rule. If the plaintiff's complaint makes reference to a document, if the document is essential or integral to the complaint and the complaint is based thereon, and if there is no disagreement as to the authenticity of the copy of the document which defendant submits with his Rule 12(b)(6) motion, the district court may consider the text of the document in ruling on defendant's Rule 12(b)(6) motion, even if plaintiff did not attach a copy of the document to his complaint or incorporate it therein by reference. I. Meyer Pincus & Assoc. v. Oppenheimer & Co., Inc., 936 F.2d 759, 762 (2d Cir. 1991); Parrino v. FHP, Inc., 146 F.3d 699 (9th Cir. 1998), cert. den. 525 U.S. 1001. However, even then, the Rule 12(b)(6) motion can only be granted where no set of facts consistent with the allegations could be proven which would entitle the plaintiff to relief. Chem-Tek, Inc. v. General Motors Corp., 816 F.Supp. 123, 126 (D.Conn. 1993).

Here, the district court expressly ruled that it was not considering any of the documents and exhibits defendant had attached to his motion, including the Note (which appeared as Ex. G to defendant's motion, A 181-185). In so ruling, the district court exercised its discretion.

Indeed, although defendant submitted to the district court copies of many documents, including the Note, he did not argue that the interest rate therein, or the fact that payment of interest and principal were deferred, had any bearing on whether the Note was a "security" under the Act. See A 63-65.

Plaintiffs appealed from the district court's order dismissing their FAC. However, defendant Sefrioui did not cross-appeal. Therefore, in their Appellants' Opening

Brief, plaintiffs did not brief the text of the Note, or the propriety of the district court's ruling not to consider the text of the Note, since these were not issues in the case. Furthermore, defendant did not submit a respondent's brief, and therefore plaintiffs did not submit a reply brief.

However, in its 2/17/00 opinion herein, the Court of Appeals claimed that the "prime rate" in effect at the relevant time was 7.25%, and observed that the text of the Note provides for a rate of 6%. The court also observed that the text of the Note indicates that payment of interest and principal were deferred until 7/1/99. The court cited Parrino, and held that plaintiffs' FAC fails to state a claim for relief as a matter of law under Rule 12(b)(6). In considering the text of the Note, the Court of Appeals implicitly held that the district court abused its discretion in deciding not to consider it. A 10-13.

The fundamental requirement of due process under the U.S. Constitution is the opportunity to be heard upon such notice and proceedings as are adequate to safeguard the rights for which the constitutional protection is invoked. Anderson National Bank v. Luckett, 321 U.S. 233, 246, 64 S.Ct. 599 (1944); Link v. Wabash Railroad Co., 370 U.S. 626, 632, 82 S.Ct. 1386 (1962).

In virtually every other circuit, if the court of appeals raises an issue sua sponte, it gives the party litigants notice of that fact, and gives the parties an opportunity to submit supplemental briefs on the issue. See, e.g., In re: Extradition of Howard, 996 F.2d 1320, 1325 (1st Cir. 1993); Gardner and Florence Call Cowles Foundation v. Empire, Inc., 754 F.2d 478, 480 (2d Cir. 1985); Speer v. City of Oregon, 847 F.2d 310, 312 (6th Cir. 1988), Motorola, Inc. v. Computer Displays Intern., Inc., 739 F.2d 1149, 1153 (7th Cir. 1984); In re: Bucyrus Grain Co., 905 F.2d 1362, 1365 (10th Cir. 1990); Duke v.

Cleland, 5 F.3d 1399, 1406 (11th Cir. 1993).

Here, however, the Court of Appeals for the Ninth Circuit never gave any advance notice to plaintiffs that it would sua sponte consider the issue of whether or not the district court had abused its discretion in not considering the text of the Note; or the issue of what was the prime interest rate in effect on 5/20/94; or the issue of whether the purported fact that the interest rate on the note was less than the prime interest rate meant that the subject Note could not be a "security" under the Act as a matter of law; or the issue of the impact of the fact that payment of principal and interest were deferred on the question of whether or not the Note was a "security."[3]

By its opinion herein, the Ninth Circuit has established the rule that it will consider issues for the first time on appeal, and will decide them, without giving the party litigants any notice or opportunity to be heard. The Ninth Circuit decided the new issues herein without giving petitioners/plaintiffs any notice that it would consider them, and without giving petitioners/plaintiffs any opportunity to submit supplemental briefing.

Petitioners/plaintiffs therefore submit that they have been denied their rights of fair play and substantial justice, and/or their right to due process under the Fifth Amendment to the U.S. Constitution. They therefore request that this Court grant their petition for writ of certiorari, so that these important issues may be decided.

Plaintiffs' contention that they were denied their rights by the Court of Appeals is supported by established, analogous law concerning the rights that a district court must afford a litigant.

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[3]The Court of Appeals raised these issues for the first time at the 1/3/00 oral argument.

In Stella v. Town of Tewksbury, Mass., 4 F.3d 53, 55-56 (1st Cir. 1993), the parties appeared for trial, but the district court gave 30 minutes notice that it was going to consider granting defendant summary judgment sua sponte. After the argument was held, it rendered summary judgment.

In reversing, the Court of Appeals held that although a district court has the power to trigger a summary judgment on its own initiative, that power is tempered by the need to ensure that the parties are given adequate notice and an opportunity to bring forward their evidence. A court's power to grant summary judgment sua sponte should be used with great circumspection. The procedural requirements for such a motion required by the federal rules are not "mere window dressing." These requirements demand that the parties be made aware of the court's intention to mull such an approach, and that they be afforded the benefit of the minimum 10-day period mandated by Rule 56. However, the district court had completely failed to follow these principles, and its actions constituted "an especially egregious example of a court . . . unfairly sandbagging litigants."

See also Neitzke v. Williams, 490 U.S. 319, 329-330, 109 S.Ct. 1827 (1989)(affirm reversal of district court's sua sponte dismissal of a pro se complaint as frivolous because it failed to state a claim for relief; plaintiff must be given adequate notice and an opportunity to meaningfully respond and oppose the motion); Celotex Corp. v. Catrett, 477 U.S. 317, 326, 106 S.Ct. 2548 (1986) (sua sponte summary judgment is only permissible if opposing party is on notice that she must come forward with all her evidence and argument); English v. Cowell, 10 F.3d 434, 437 (7th Cir. 1993)(if complaint is not totally frivolous, it is mandatory that district court cannot

dismiss complaint or grant summary judgment without first notifying the parties of its intentions, and allowing them to cure the defect in the complaint and/or to respond with written arguments and/or evidence).

Here, the Court of Appeals did not give plaintiffs any notice or opportunity to brief any of the new issues; in the language of Stella, it "unfairly sandbagged" them.[4]

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[4] The error of the Court of Appeals was not "harmless", because plaintiffs did have something substantial to say in opposition. See English v. Cowell, supra, 10 F.3d at 438. First, the district court did not abuse its discretion in not considering the extrinsic material, i.e., the text of the Note. A district court is entitled to a degree of deference (Pierce v. Underwood, 487 U.S. 552, 560-562, 108 S.Ct. 2541 (1988)), and the district court's decision was not clearly erroneous. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 399-405, 110 S.Ct. 2447 (1990).

Secondly, as shown below, even if the text were considered, it is clear that the Note could constitute a "security" under the Act.

Thirdly, whether a particular instrument is a "security" under the Act is a question of fact. SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351, 64 S.Ct. 120 (1943); Koch v. Hankins, 928 F.2d 1471, 1479-1481 (9th Cir. 1991). If given the opportunity, plaintiffs would have submitted a declaration from Jacques Konckier, JPSA's president and CEO, as to JPSA's "profit motive" in "purchasing" the Note; as well as declarations from a securities and investment expert to the same effect, and stating that in his opinion an objective, rational investor would have had such a motive.

Fourthly, the Court of Appeals took judicial notice that the "prime rate" in effect on 5/20/94 was 7.25%, and acknowledged that plaintiffs' right to request an opportunity to challenge the propriety of the court's taking judicial notice of this purported fact, as well as the substance thereof, citing F.R.E. 201(e). A 11. However, although plaintiffs requested such an opportunity in their petition for rehearing, the court ignored their request. Plaintiffs wanted a chance to challenge the court's figure, and to demonstrate that the relevant figure may have been something

Of course, even in the absence of a cross-appeal, an appellee may urge in support of affirmance of an order any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court; but may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary. This rule also applies when the court raises an issue sua sponte. El Paso Natural Gas Co. v. Neztsosie, ___ U.S. ___, 119 S.Ct. 1430, 1434-1435 (1999).

Here, the argument that the district court erred in refusing to consider extrinsic matter is not merely an

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else in France, where the lender was based, and may have been something else for an international business transaction.

Fifthly, if given the opportunity plaintiffs would have argued the significance of the other documents created at formation of the venture. Many of these were also attached to defendant's Rule 12(b)(6) motion, but the Court of Appeals selectively did not consider them. These included the the Limited Partnership Agreement (A 87-189) and the Shareholders' Agreement (A 190-222), each of which clearly evidences JPSA's "profit" motive in acquiring the Note. In the former, JPSA promised to loan $5 mil. to the venture, Jeanne Piaubert Cosmetics (JPC); and all parties agreed that JPSA would receive a certain equity position (stock) in the venture, as well as the Note. That is, the agreement providing for both the stock and the Note. When considering if JPSA was motivated by the profit the Note would generate, the court should have considered the entirety of the "bundle of rights" JPSA received.

Sixthly, plaintiffs would have argued that starting 7/1/99, the Note bears interest at 11%, well above the court-described purported "prime rate."

attack on the "reasoning" of the district court. Also, since defendant's proffer of the Note was rejected by the district court, the Note does not appear "in the record."

However, in this petition, plaintiffs assume arguendo that under the rule recited in El Paso, the Court of Appeals could have properly considered the issue of the correctness of the district court's ruling disallowing any extrinsic matter, if raised either by defendant Sefrioui, or by the court sua sponte; providing that plaintiffs had been given adequate notice and an opportunity to respond. That is, for one to merely assert that under El Paso the Court of Appeals could have considered the issue is to merely beg the question and assume the conclusion with respect to the issue involved in this petition for writ. That issue is whether plaintiffs were given adequate notice and an opportunity to respond.

2. THE COURT OF APPEALS ERRONEOUSLY ESTABLISHED A "PER SE" RULE CONCERNING THE RATE OF INTEREST AND WHETHER OR NOT A NOTE IS A "SECURITY"; AND ERRONEOUSLY CONSIDERED ONLY THE RATE OF INTEREST IN EVALUATING THE "PROFITS A NOTE IS EXPECTED TO GENERATE"

A. Introduction

Even assuming arguendo that none of the holdings and rulings of the Court of Appeals for the Ninth Circuit described above was erroneous; petitioners/plaintiffs submit that the court's substantive holdings herein on the issue of whether the subject Note is a "security" are highly inconsistent with decisions of other circuits, and of this Court itself. In the alternative, plaintiffs submit that these are important issues of federal law which need to be

addressed, clarified and settled by this Court. Therefore, they respectfully submit that their petition to this Court be granted. Supreme Court Rules 10(a) and 10(c).

B. This Court's Opinion in Reves v. Ernst & Young is the Defining Authority On When A "Note" is a "Security"

In Reves v. Ernst & Young, supra, this Court noted that the fundamental purpose of the Securities Exchange Act of 1934, as well as of the Securities Act of 1933, was to eliminate serious abuses in a largely unregulated securities market. In defining the scope of the market that it wished to regulate, Congress painted with a broad brush, recognizing the virtually limitless scope of human ingenuity, especially in the creation of countless and variable schemes devised by those who seek the use of the money of others on the promise of profits. In these Acts, Congress determined that the best way to achieve its goal of protecting investors was to define "security" in broad and general terms so as to include the many types of instruments that fall within the ordinary concept of a "security", and to encompass virtually any instrument that might be sold as an "investment." 494 U.S. at 60-61. The term "security" is to be construed flexibly, not technically or restrictively. Superintendent of Ins. of State of New York v. Bankers Life and Cas. Co., 404 U.S. 6, 92 S.Ct. 165 (1971). The court must examine the substance or "economic realities" of the transaction, not only the form thereof, in deciding if a "security" is involved. Futura Dev. Corp. v. Centex Corp., 761 F.2d 33, 39 (1st Cir. 1985), cert. den. 474 U.S. 850.

In Reves, this Court observed that the Act specifically recites that "any note" is a "security," and held that there is therefore a presumption that every note is a security. 494 U.S. at 60-61, 65.

The presumption is rebuttable. A note will be deemed not to be a security if it closely resembles any of a family of notes which the courts have held are not securities: a note made in consumer financing, a note secured by a home mortgage, a short-term note secured by a lien on a small business, a note evidencing a "character" loan to a bank customer, short-term notes secured by an assignment of accounts receivable, a note which formalizes an open-account debt incurred in the ordinary course of business (particularly if it is collateralized), and a note evidencing a loan by a commercial bank for current operations. 494 U.S. at 64-65.

Here, the Court of Appeals correctly held that the subject Note did not closely resemble any of the instruments described in the "family" of instruments set forth in Reves. A 12:21-24.

In Reves, the Court stated that if the subject note does not closely resemble any of the instruments described in the "family", the following factors should be considered when deciding if a note should be added to the list of those instruments which are not securities: 1) the motivations that would prompt a reasonable seller and buyer to enter into it; if the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments, and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a "security"; on the other hand, if the note is exchanged to facilitate the mere purchase and sale of a minor asset or a consumer good, to correct for the seller's cash flow difficulties; or for some other commercial or consumer purpose; the note is less likely to be a "security"; 2) the plan of distribution; 3) the reasonable expectations of the investing public; 4) whether there exists another

regulatory scheme which significantly reduces the risk of the subject instrument. 494 U.S. at 66-67.

In Reves this Court further held that the "investment vs. commercial" test that had been used by some circuits was really the same way of formulating the same general approach as the "family resemblance" test (491 U.S. at 64). In holding that the note in that case was a "security" under the family resemblance test, this Court held that the subject transaction was conceived as an investment in a business enterprise rather than as a purely commercial or consumer transaction. 491 U.S. at 68.

In its opinion, the Court of Appeals expressly stated that it was relying on statements in Reves indicating notes issued in an "investment" context are "securities", and that those issued in a commercial or consumer context are not; and that the result it reached in this case was based upon its analysis under the investment/ commercial dichotomy. A 9:17-2, 24-28; 10:1-4; 13:5-9.

C. The Court of Appeals' Opinion Irrationally Tries to Break Down Reves Factor no. 1 Into Two Factors

In its opinion herein, the Court of Appeals analyzed the subject Note with respect to Reves' factor no. 1. The court acknowledged that the motivation of Limited Partnership, the "seller" of the subject Note, would indicate that the Note is a "security" under the Act, under that factor. A 12:25-27. The court was clearly correct on that point. The entire purpose of the subject Note was to capitalize the brand new venture with the $5 mil. being provided by plaintiffs. The Note proceeds were the only capital that Limited Partnership received to start up.

This is the age of "Internet" and other start-up companies, which are capitalized initially by contributions by the founders, and which perhaps then issue "IPO's" or

"initial public offerings." Providing "venture capital" is the paradigm of today's way of investing. This Court may take judicial notice of these facts. Ohio Bell Tel. Co. v. P.U.C., 301 U.S. 292, 301, 57 S.Ct. 724 (1937). Here, plaintiffs' FAC, and any other facts the Court may consider, indisputably show that the money that plaintiff JPSA was providing, as evidenced by the Note, was venture capital of this type, i.e., an investment of this type. Therefore, the Note is a "security."

The "family resemblance" test of Reves states that notes given to evidence "ongoing business purpose" loans, such as loans to finance accounts receivable, loans to finance inventory purchases, letters of credit, etc., are not "investments", and are therefore not "securities" under the 1934 Act. The proceeds of these loans do not provide venture capital. Therefore, the notes evidencing these loans are not "securities." However, when a note does evidence the furnishing of venture capital, it does satisfy factor no.1 of Reves, does not "closely resemble" the "family of notes" that are not securities, and is a security.

However, in a rather strange twist, the Court of Appeals attempted to compartmentalize and sever the motivation of the "seller" of the Note (Limited Partnership) from the motivation of the "buyer" of the Note (JPSA), and to transform Reves factor no. 1 into two completely separate and distinct factors. It held that "no reasonable buyer" would have loaned money to a start-up venture below the prime interest rate if it was "interested primarily in the profit the 6% note - as opposed to the Limited Partnership itself - would generate." A 12:27 - 13:2. It then held that "therefore" the subject Note was not a "security" under the Act.

Plaintiffs submit that the Court of Appeals' approach is wrong, and conflicts with Reves and other cases.

Plainly, Reves factor no. 1 considers the overall type of transaction involved, and does not permit a court to use a verbal construct in an effort to characterize the type of transaction in two completely separate and opposite ways, depending on whether one is examining the transaction from the standpoint of the maker of the note, or from the standpoint of the lender. The cases uniformly hold that if the loan proceeds are to be used as venture capital for a new business, for the general purposes of the business, that Reves factor no. 1 has been satisfied. See, e.g., Exchange National Bank v. Touche, Ross & Co., 544 F.2d 1126 (2d Cir. 1976), cert. den. 469 U.S. 884 (cited and relied on in Reves;); Diaz Vicente v. Obenauer, 736 F.Supp. 679 (E.D. Va. 1990).

Since the Court of Appeals' opinion herein is in conflict with Reves and with these cases from other circuits, plaintiffs respectfully submit that this Court grant their petition.

D. The Test of Reves is Satisfied if The Note Pays Interest; the "Rate" of Interest is A Completely Neutral Factor

The opinion of the Court of Appeals herein is based almost entirely on its holding that the purported "prime" interest rate at the time the note was made was 7.25%; the subject note bears a rate of 6%; no rational "investor" would ever provide money if he expected to receive a rate less than the existing prime rate; and that "therefore" the subject note was not "investment" in nature, and "therefore" was "commercial" in nature. Thus, the Court of Appeals herein adopted a "per se" rule: if the note in question bears a rate of interest that is below the prime rate, it can never be an "investment", as a matter of law.

It is true that courts utilizing the "investment/ commercial" dichotomy approach have employed an

"either/or" test - the subject note is either 1) an "investment" note, or 2) a "commercial" or "consumer" note. See, e.g., Zabriskie v. Lewis, 507 F.2d 546, 551 (10th Cir. 1974); Futura Dev. Corp. v. Centex Corp., supra, 761 F.2d at 40.

However, the Court of Appeals' argument proves too much.

Plaintiffs request this Court to take judicial notice that a commercial lender, as well as a consumer loan lender, will be certain to insist on a rate higher than the prime rate (unless the borrower is a Fortune 100 company). The whole concept of the "prime rate" exists in the context of business world, where commercial and consumer loans are made. The "prime rate" is a rate that a bank or other commercial lender will charge its best customers, e.g., Fortune 100 companies. Everyone else who obtains a commercial or consumer loan must pay a rate higher than "prime."

Therefore, since no rational lender would make a commercial or consumer loan at a rate of 6%, if the prime rate were 7.25%; the subject note cannot be a commercial or consumer note, as a matter of law. Therefore, it is an investment note, and therefore a "security"!

Alternatively, if the note bears a rate of interest greater than prime, it must be a commercial note, because any rational commercial lender would insist on such a rate; therefore, it cannot be an "investment" note, and therefore not a "security." However, according to the opinion of the Court of Appeals herein, if the note bears a rate of interest below the prime rate, it cannot be an "investment" note, and therefore not a "security." Therefore, whether the note bears a rate of interest greater than prime or below prime, it cannot be an

"investment" note, and therefore cannot be a "security." Therefore, no note can ever be a "security"!

The Court of Appeals' "per se" rule makes no sense.

In C.N.S. Enterprises, Inc. v. G & G Enterprises, Inc., 508 F.2d 1354, 1359 (7th Cir. 1975), cert. den. 423 U.S. 825, the court correctly noted that every lender of money is an investor in a sense, since he places his money at risk in anticipation of a profit in the form of interest. Thus, in this sense, every commercial lender is an investor. The court further noted that in a sense every investor is a "lender" who loans money to a borrower for a price and is expected to return it one day. In Hussinger v. Rockford Bus. Credits, Inc., 745 F.2d 484, 489-490 (7th Cir. 1984) the court held that "a note that bears a fixed rate of interest is as likely to be evidence of a commercial loan as an investment", and that the fact that the note bears a fixed rate of interest is therefore a neutral factor, which militates neither in favor of nor against the proposition that a note is an "investment" and therefore a "security."

As noted in Reves and in many other cases, the very fact that the note generates interest itself demonstrates that the "buyer" of the note has a profit motive. See, e.g., Reves, 494 U.S. at 68 fn.4 ("We emphasize that by "profit" in the context of notes, we mean "a valuable return on an investment," which undoubtedly includes interest."); Hussinger, supra (notes bore interest at a rate of 1% over prime, but the rate was a neutral factor); Stoiber v. SEC, 161 F.3d 745, 750 (D.C. Cir. 1998), cert. den. 119 S.Ct. 1464; Mercer v. Jaffe, Snider, et al., 736 F.Supp. 764, 770 (W.D. Mich. 1990), affd. w/o opinion 933 F.2d 1008, and sub. nom. Schriemer v. Greenburg, 931 F.2d 893 (6th Cir. 1991).

Plaintiffs submit that these cases establish that if the "seller" gives the note to acquire funds with which to

generally capitalize the business, as opposed to obtaining funds for a "commercial" purpose such as short term financing, financing the purchase of a specific item, etc.; and if the "buyer" is to receive interest; that Reves factor no.1 has been satisfied, regardless of the interest rate the note bears. Plaintiffs submit that by adopting its "per se" rule that a note that bears a rate of interest below prime can never be an investment, and therefore can never be a "security", the Court of Appeals herein has set forth a rule which is in flagrant conflict with the rules of law established by this Court and by other circuits.

E. Instead of Weighing the Reves Factors, the Court of Appeals Herein Treats the Purported Failure of a Perceived Sub-Category of One of the Factors as Providing Automatic Disqualification

Cases from other circuits hold that the fact that one of the Reves factors may not be satisfied is not fatal, and that a final decision can only be made upon the balancing of all the factors. See, e.g., Holloway v. Peat, Marwick, Mitchell & Co., 879 F.2d 772, 779 (10th Cir. 1989)(cited with approval in Reves); vac. and remanded, 494 U.S. 1014; reaffirmed, 900 F.2d 1485 (10th Cir. 1990), cert. den. 498 U.S. 958.

Here, however, the Court of Appeals improperly; treated each of the Reves factors, and each theoretical "subdivision" thereof, as a "necessary condition" or element of a claim under the Act. Under its opinion herein, the alleged failure of the facts to satisfy one perceived sub-category of one of the Reves factors necessarily means that the note is not a "security." Nowhere did the Court of Appeals weigh and consider the seller's motivation herein (obtain venture capital) against the purported motive of the "buyer" of the Note,

in light of the presumption that every note is a "security."

Since the Court of Appeals' opinion is in conflict with Reves and with cases from other circuits, plaintiffs respectfully submit that this Court grant their petition.

F. The Holding That Interest Payable on the Note is the Only Kind of "Profit" That the Note May be Expected to Generate, Conflicts with Reves and With Opinions from Other Circuits

Most importantly, in Reves this Court held that profit in the form of interest payable was only one kind of "profit" to be considered in the analysis of factor no. 1. At 494 U.S. at 68 fn 4, this Court explained that by "profit" in the context of notes, the Court meant "'a valuable return on an investment"; that "capital appreciation" and "participation in earnings", by themselves, are "too restrictive" in describing what the Court means by "profit" in this context; and that profit may also "include" the interest on the note itself.

However, plaintiffs submit, by the same token, "profit" in this context may also include "capital appreciation" or "participation in earnings."

Here, it is beyond dispute that plaintiffs' FAC alleges, and that any extrinsic evidence that may be considered demonstrates, that JPSA expected the Note to generate a profit in the form of capital appreciation, participation in earnings, and interest.

However, in its opinion, the Court of Appeals completely ignores the "capital appreciation" and "participation in earnings" aspects of this factor! Instead, the Court of Appeals' opinion states that interest is the only way in which a note may generate "profit" under Reves. Plaintiffs submit that this approach is erroneous, and conflicts with Reves.

Although the Court of Appeals did not consider the

actual text of the Shareholders' Agreement and Limited Partnership Agreement, the Court of Appeals summarized the allegations of the FAC, and stated:

> "On these facts, the only economically sensible explanation of the unfavorable terms of the note is based on the fact that JPSA had a 2/3 interest in the holding company that owned the general partner of the limited partnership from which it bought the note. That newly formed limited partnership needed operating funds, and JPSA supplied those funds when it bought the note. Although JPSA could not reasonably have expected to profit from the below-market interest it earned on the note itself as an investment instrument, it could have hoped to reap its reward from the business profits it expected the limited partnership to generate." (A 12:6-17, emphasis added).

Therefore, the Court of Appeals expressly acknowledged that JPSA did have a profit motive in buying the Note. It erred, however, when it stated that the only kind of "profit" that may be considered in deciding if the Note is a "security" is the rate of interest payable; and that the "profit" the note is expected to generate in the form of enabling the business to get off the ground and function, and of enabling the buyer of the note, who is also the holder of a substantial equity interest in the company, to receive capital appreciation and participation in earnings, may not be considered.

The Court of Appeals artificially "compartmentalized" the transaction, and insisted on considering the Note by itself (A 12:1-5, 12:27 - 13:2), as if JPSA had no other connection to or interest in the venture! However, such a view ignores the "economic realities." It is plain that JPSA supplied the loan proceeds (evidenced by the

Note), and that those loan proceeds were expected to generate a profit.

Even when a lender occupies no other role in a venture, he hopes to make a profit from the fact that the borrower will utilize the loan proceeds to generate business activity and will make a profit thereon, and will use those profits to repay the lender. The "note" is only a piece of paper; it does not "generate" profit. Instead, it is always the loan proceeds which generate the business activity, and which therefore generate the "profit."

Therefore, plaintiffs submit that Reves requires a court to consider whether the lender is motivated by the expectation of profits that the loan proceeds are expected to generate, in every case. The Court of Appeals' distinction between "profits the note is expected to generate" and "profits the loan proceeds are expected to generate" makes no sense.

Before this Court decided Reves, some lower courts had had difficulty in determining that a "note" was a "security" because of confusion about whether or not any instrument, including a note, had to satisfy the "investment contract" elements of SEC v. W.J. Howey Co., 328 U.S. 293, 66 S.Ct. 1100 (1946), including the elements of reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. Reves, 494 U.S. at 64. Under Howey, expectation of business profits and/or capital appreciation were the typical kind of "profits" that an investor who satisfied the Howey elements was seeking.

However, in Reves this Court rejected the notion that a "note" must satisfy all of the Howey elements before it may be considered a "security" (Id.), and instead adopted the "family resemblance" test of the 2d Circuit for a "note to be a "security", as described in cases such as Exchange

National Bank, supra, and as explained hereinabove. While adopting the easier to satisfy "family resemblance" test, the Court also relaxed the test for the element of the kind of profit that the investor should expect. As noted above, the investor is not required to demonstrate that he expected business profits or capital appreciation. Instead, he may satisfy the requirement by simply demonstrating that he expected to receive "profit" in the form of interest on the note.

However, that is not to say that profit in the form of interest on the note is the only way in which the investor may show that he expected some profit. Instead, that is only one way. Plaintiffs submit that such an investor may also show that he expected profit in the form of business profits and/or capital appreciation. Stating it another way, profit in the form of business profits or capital appreciation have not been "ruled out" as ways of showing expectation of profit with respect to a "note."

However, in its opinion herein, the Court of Appeals has ruled out business profits and capital appreciation as ways in which a lender may expect a note to generate profits, holding that in order for a note to be a "security", the only kind of "profit" that is relevant is interest itself.

See also Diaz Vicente v. Obenauer, supra (plaintiffs bought "units" and "participation agreements" in real estate project; principal not to be repaid for 2 1/2 years, and net proceeds from project would also be payable to plaintiffs, so plaintiffs' ultimate return on their cash contributions would be quite high; held that under Reves' "note" analysis, plaintiffs had acquired "securities"; In re: NBW Commercial Paper Lit., 813 F.Supp. 7, 12 (D.D.C. 1992)(bank holding company sold commercial paper to capitalize its wholly owned mortgage subsidiary; the relevant inquiry concerning the motivation of the buyer

of a note is whether he is interested in "profit or investment" (emphasis added), rather than financing appurtenant to a sale); 5 A.Jacobs, Litigation and Practice Under Rule 10b-5 (2d ed.), sec. 38.03[dd][ii][B] (same); Holloway v. Peat, et al., supra, 879 F.2d at 778 (one factor under "commercial/ investment" test for note to be a "security" is whether repayment is contingent on profit or productivity; later opinion, 900 F.2d at 1487-88, holds that the 8 factors for the "commercial investment" test yield same results as the 4 factors of the "family resemblance" test); Shults v. Henderson, 625 F.Supp. 1419 (W.D.N.Y. 1986), aff'd. w/o opinion 805 F.2d 391 (2d Cir. 1986)(HBC corp. sold radio station to D, in exchange for a 10 year promissory note and a 10 year consulting contract for H, the principal of HBC; held that the note was a "security"; the note and consulting agreement put HBC and H in the position of having first rights to the profits in the station for the next 10 years; this was unquestionably a 10 year investment in the hoped-for profitability of the station); National Bank of Commerce v. All American Assur. Co., 583 F.2d 1295 (5th Cir. 1978) ("commercial/investment" test; note was not a "security"; bank anticipated no gain beyond the repayment of the note with interest; repayment was not conditioned on the profit or productivity of the borrower); Westchester Corp. v. Peat, et al., 626 F.2d 1212, 1216 (5th Cir. 1980) ("commercial/ investment" test; note is more likely to be a "security" if lender expects to participate in maker's profits or is to receive substantial benefits from maker's success extrinsic to the direct return on the loan); 5 A.Jacobs, supra, sec. 38.03[dd][ii][B] (same); Futura Dev. Corp. v. Centex Corp., supra, 761 F.2d at 41 (factors for a note to be a "security" under the "commercial/investment" test include

whether the object of the payee of the note was to acquire an interest in the property or enterprise of the borrower, and the degree to which the profit on the note is in the hands of the maker rather than the payee); Zabriskie v. Lewis, supra, 507 F.2d at 551 and fn.9 (one way in which an "investment" transaction involving a note may be distinguished from a "commercial" transaction is that "stock" is oftentimes actually given in the former; also list same factors as in Holloway, supra).

Some of these cases (Holloway, National Bank) hold that if repayment of the principal and/or payment of interest is contingent on the profitability or success of the borrower, it is likely that the note is a "security." Here, no payment of interest or principal was due until more than 5 years after the making of the note. Therefore, as a practical matter, if the new business venture were not successful and profitable, Limited Partnership would no doubt cease doing business and be dissolved long before the passing of 5 years. Therefore, as a practical matter, repayment of principal and payment of interest were contingent on the success or profitability of the borrower. However, the Court of Appeals ignored that fact.

Plaintiffs submit that the opinion herein of the U.S. Court of Appeals for the Ninth Circuit is in direct conflict with this Court's opinion in Reves, and also with the above-cited opinions from other circuits. They respectfully request that their petition be granted.

3. THE FACTS INDICATE THAT THE OTHER REVES FACTORS MAY BE SATISFIED

It is settled that the question of whether a particular instrument is a "security" under the Act is a question of fact for the trier of fact. See, e.g., L&B Hosp. Ventures v. Healthcare International, Inc., 894 F.2d 150 (5th Cir.

1990), rehear. den. 901 F.2d 1110, cert. den. 498 U.S. 815; Koch v. Hankins, 928 F.2d 1471, 1479-81 (9th Cir. 1991). Here, even if arguendo the Court of Appeals properly considered the text of the Note, the facts are clearly sufficient to permit a trier of fact to conclude that the subject Note is a "security" under the Act.

Plaintiffs have already demonstrated this proposition with respect to Reves factor no. 1.

Although there was no distribution of notes to the general public, case authority indicates that Reves factor no. 2 may be satisfied if the "buyer" of the note was not in the business of making loans. Hussinger, supra, 745 F.2d at 488; Zabriskie, supra, 507 F.2d at 551; Movielab, Inc. v. Berkey Photo, Inc., 452 F.2d 662 (2d Cir. 1971). Here, plaintiff JPSA was clearly not "in the business" of making loans. Moreover, a number of cases have found the existence of a "security" where the subject note was distributed to or "purchased" by only one person or entity. See, e.g., Movielab, Inc.; Exchange National Bank v. Touche, Ross, et al., supra; Shults v. Henderson, supra.

Decisions after Reves have held that factor no. 3 ("reasonable expectations of the investing public") is inapplicable when there has been no issuance of securities to the public. (see, e.g., Guidry v. Bank of LaPlace, 740 F.Supp. 1208,1215 (E.D.La.1990), aff'd., mod., 954 F.2d 278 (5th Cir. 1992)). Therefore, that factor is inapplicable here.

Reves factor no. 4 ("whether any other regulatory system applies") is limited to whether any other federal regulatory system applies. Holloway v. Peat, Marwick, et al., supra, 900 F.2d at 1488; 5 A.Jacobs, supra, sec. 38.03[dd][ii][B]. Here, there is no such other federal regulatory system. Other authority indicates that the 4th factor of Reves should be more broadly stated as

inquiring whether any other "risk reducing" factors, such as collateral or insurance, are present. If there are such factors, there is less need for protection under the federal securities laws. See, e.g., Resolution Trust Corp. v. Stone, 998 F.2d 1534, 1539 (10th Cir. 1993); Bradford v. Moench, 809 F.Supp. 1473, 1483 (D.Utah 1992)

Here, the subject Note was uncollateralized and uninsured, and there were no other risk reducing factors.

Furthermore, as noted supra, even if arguendo one of the Reves factors were to imply that the instrument was not a security, that would not be fatal. Instead, a court is to balance and weigh the factors.

Moreover, anytime a lender gives money and the borrower gives a note, there has been a "sale" of the note within the meaning of the securities laws. Zabriskie v. Lewis, supra, 507 F.2d at 552.

CONCLUSION

For the foregoing reasons, petitioners/plaintiffs, Jeanne Piaubert, S.A., and Fragrance Group, Ltd., respectfully submit that their petition for writ of certiorari be granted.

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Respectfully submitted,
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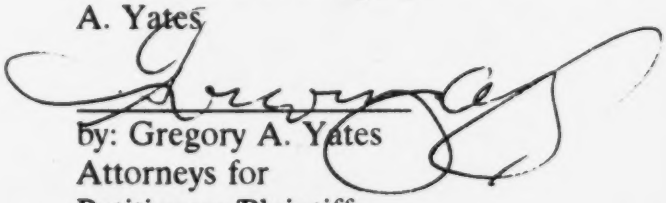

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